

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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2 Annexes

SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA POSITION ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING DIRECTIVE 89/552/EC; TELEVISION WITHOUT FRONTIERS DIRECTIVE (TVWF DIRECTIVE)

Executive Summary

In this paper the EEA EFTA States will present the following recommendations:

- **Gambling services should be derogated from the scope of the Directive**
- **It is necessary to find an appropriate solution for cases where an audiovisual media service is particularly targeting the public in another Member State. A provision in line with the existing Article 16 of the European Convention on Transfrontier Television might be included, to address the problem.**
- **The proposal regarding product placements is inadvisable. The proposals regarding insertion of advertisements should be reconsidered, based on an evaluation of how the proposals have an impact on the interest of the viewers.**
- **Regulation on qualitative restrictions for commercial communications should be adapted in full to all audiovisual services.**
- **A clarification should be added to Article 3 no 1 to the TVWF Directive that stresses that Member States maintain their liberty to impose rules that are stricter than the minimum regulations of the TVWF Directive even when the same matter is also regulated in the UCP Directive.**

I Introduction

1. The EEA EFTA States refer to the legislative proposal for the revision of the Television without Frontiers Directive from the Commission of the European Communities (COM(2005) 646 final), dated 13 December 2005. Furthermore the

EEA EFTA States refer to the prior EEA EFTA Comments on 24 July 2003 on the possible revision of the TVWF Directive, and 14 September 2005 on the Issue Papers for the Liverpool Audiovisual Conference 21/21 September 2005, which are enclosed (Annex 1 and 2).

II Material competence

2. In general, the EEA EFTA States support the establishment of a comprehensive legal framework for all audiovisual media services. The EEA EFTA states support the proposal to introduce basic principles for all audiovisual media services, whilst at the same time differentiating the level of regulation in accordance to the degree of user control. The new Directive should create a more level playing field for service providers that provide similar kinds of audiovisual content over different platforms. We will particularly welcome the possible establishment of a pan-European set of basic rules, e.g. the provisions on the protection of minors and incitement to hatred.

3. The proposal for amendments to the TVWF Directive does not contain any limitations or derogations from the scope of the directive with regard to the marketing and promotion of gambling activities. In the EEA EFTA States, gambling has traditionally been regulated within a stringent framework with the objective to uphold legitimate interests of public policy and order, consumer protection, and to avoid damaging social consequences such as problem gambling and fraud.

4. At present, the marketing and promotion of gambling activities are not derogated from the scope of the prevailing TVWF Directive. The proposed expansion of the directives scope would allow for the marketing and promotion of gambling services on a wider scale than at present. Gambling activities are permanently derogated from the scope of the e-Commerce directive and the current draft Service Directive. Gambling services should also be permanently derogated from the Television without Frontiers Directive. This would be in conformity with regard to the regulation of gambling services within secondary EU-legislation.

III Territorial competence

5. The EEA EFTA States recognises the importance of the “country of origin” principle. However, we share the concerns expressed by several Member States regarding the regulation of broadcast services that are established in one Member State, but primarily targeting the audience in one or more other Member States. These concerns should be carefully addressed without undermining the “country of origin” principle.

6. The EEA EFTA States support the assessments and intentions of the proposal in the letter dated 9 December 2005 from the Government of Sweden on behalf of 13 Member States.

7. The EEA EFTA States fear that the proposal of the Commission is inadequate to address this issue since it will in practice be nearly impossible to prove that the establishment of the service provider is based on fraudulent circumvention of local legislation. The EEA EFTA States consider it necessary to find an appropriate solution for cases where an audiovisual media service is particularly targeting the public in another Member State.

8. A possible solution to the challenge from targeted services could be to include a provision in the TVWF Directive in line with the existing Article 16 of the European Convention on Transfrontier Television. The first paragraph of this article reads:

“ In order to avoid distortions in competition and endangering the televisions system of a Party, advertising and tele-shopping which are specifically and with some frequency directed to audiences in a single Party other than the transmitting Party shall not circumvent the television advertising and tele-shopping rules in that particularly Party.”

9. In line with this proposal, we also support the proposal of Latvia to establish an obligatory consultation procedure between the NRAs of the countries involved.

IV Commercial communications – liberalising the advertising rules for television broadcasts

10. The EEA EFTA States strongly emphasise the essential importance of the principle of separation between advertising and editorial content. They are concerned that the introduction of provisions on product placements could undermine this principle.

11. Furthermore, the authorisation of product placement might affect the broadcasters' editorial decisions on content programming and the commissioning of programmes. They are concerned that there could be a reduced interest among broadcasters to invest in programmes where product placement will be prohibited; news, current affairs, documentaries and children's programmes. In addition, the proposal is based on the argument that the identification of product placement in the beginning of the programme makes it transparent for the viewers. Recognising this principle, the EEA EFTA States are however concerned that these identifications are either not efficient or primarily serving promotional purposes.

12. The EEA EFTA States recognise the need for a flexible framework for commercial broadcasters. Adequate regulations may help to preserve free-to-air broadcasters in Europe. However, the framework must strike a balance between the interests of the broadcasters and the interests of the viewers. In general, we cannot see that the present legislative proposal addresses the interests of the viewers in a sufficient manner. Our main concern is that more flexible or liberal insertion rules might expose viewers to the more intrusive commercial breaks in programmes. Secondly, more liberal insertion rules could conflict with right holder's interests. Thirdly, there is a risk that more liberal rules for specific categories of programmes could provide broadcasters with an incentive to give lower priority to children's programmes, current affairs programmes and news, as these might be perceived as less profitable. Consequently, the EEA EFTA States are of the opinion that the proposed amendments of Article 11 should be reconsidered based on an evaluation of how the proposal has an impact on the interest of the viewers.

V Commercial communications – qualitative restrictions for non-linear services

13. The EEA EFTA States welcome the establishment of a basic tier of qualitative rules applicable to all audiovisual communications. Consequently, we support the proposal that the regulation of the present directive related to alcohol, tobacco

products, the protection of minors and human dignity should be adapted to cover all audiovisual services.

14. However, some parts of the regulation in the present TVWF directive have not been proposed to be adapted in full to all audiovisual media services, namely on respect for human dignity and on alcohol and pharmaceutical products cf. articles 12, 14 and 15. In the view of the EEA EFTA States, general interest objectives imply that these articles could be applied in full to all audiovisual media services.

VI Commercial communications – the relationship with the Unfair Commercial Practices Directive

15. The EEA EFTA States are pleased that the Commission has stressed that the Unfair Commercial Practices Directive (“the UCP Directive”) is a general act that does not replace sector-specific regulation. In case of conflict of this general regulation with sector-specific EU regulation such as the TVWF Directive, the sector-specific regulation applies. However, as the UCP Directive is a total harmonisation directive while the TVWF Directive is a minimum harmonisation directive, the question arises whether Member States may still apply regulations that are stricter than the minimum regulation in the TVWF Directive when the same matter is also regulated in the UCP Directive. One example is the prohibitions in both the TVWF Directive and the UCP Directive on commercial communications targeting minors. The EEA EFTA States are concerned that the rules in the UCP Directive may force Member States such as Norway and Sweden to liberalise their regulations.

16. The EEA EFTA States consider that a requirement to liberalise national regulation would be in discord with the fundamental principle of the TVWF Directive as a minimum harmonisation directive for the internal market. One solution to this problem could be to add the following paragraph to Article 3 no 1 to the TVWF Directive:

“Member States maintain their liberty to impose rules that are stricter than the minimum regulations of this Directive even when the same matter is also regulated in the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market.”

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